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ABSTRACT

Focusing upon the scope of contemporary American Indian tribal development, this Indian Studies syllabus constitutes a three-hour political science course at the college level. Course objectives are identified as understanding: tribal powers as described in tribal constitutions and by-laws; the complexities of tribal sovereignty; Federal and tribal jurisdiction in the area of law and order on Indian reservations; the role of the Bureau of Indian Affairs (BIA) in its relationship with Indians; and self-determination through case studies. Presented individually, the five units of this course syllabus parallel the five course objectives and include individual unit objectives, reading materials lists, instructions to the instructor, and student activities. A 28-item bibliography and a 7-item film list are also included. (JC)

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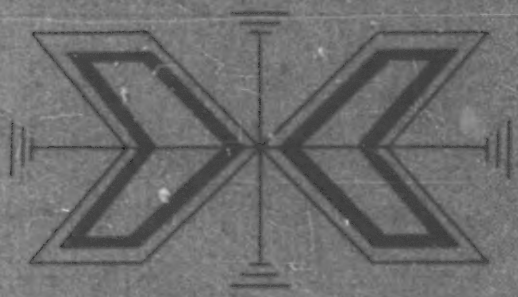

Indian Studies

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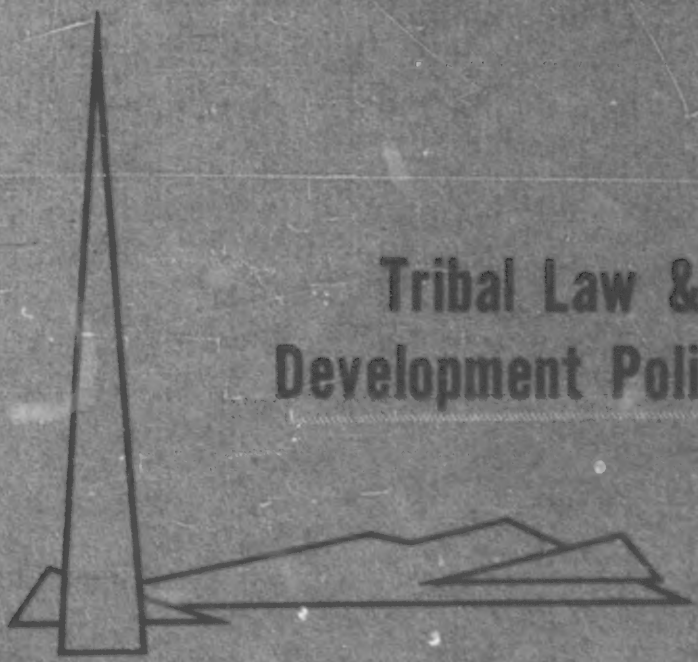
Tribal Law & Development Policies



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RC080948

TRIBAL LAW AND DEVELOPMENT POLICIES

Pols 331 3 Credit Hours

Course Description:

The powers of tribal government, including problems of jurisdiction, taxation, and police powers, will be studied. A review of federal policy towards American Indians.

The Tribal Law and Development Policies course outline, presented in this publication, was made possible by an appropriation from the State of South Dakota to Black Hills State College, Center of Indian Studies, Spearfish, South Dakota.

The opinions expressed do not necessarily reflect the position or policy of the State of South Dakota and no official endorsement by the State of South Dakota should be inferred.

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Introduction

Tribal Law and Development Policies is a syllabus which intends to focus upon the scope of contemporary tribal development. Like other political science syllabuses, it takes its roots from an era prior to the treaty signing period while attempting to deal with specific units on current jurisdiction, sovereignty, and self-determination. Without dwelling too long upon the federal policy towards the American Indian, it places importance upon contemporary case studies wherein tribal governments or communities have sought to retain rights.

The student may be best prepared for studying Tribal Law and Development Policies after absorbing the structure of tribal governments as described in tribal constitutions and by-laws. Therein lies the power of a tribal group, and the rights are supported by the majority of the reservation people.

The sovereignty of tribal governments began with the first contacts between Europeans and Indians and has been shaped through the ensuing years of peace and conflict. It is unfortunate that tribal members do not understand the concept of sovereignty and fear its role in self-determination and its revolutionary implications. After years of paternalism, sovereignty is probably least understood by Indians; and yet, only through its exercise can tribal governments be rendered effective and meet the needs of its tribal members.

Jurisdiction for both federal and tribal governments, like sovereignty, is rooted in the past, but with immediate implications for future tribal stability. Through the division of responsibility between federal and tribal jurisdiction, the right of a society to maintain its laws and

punish its violators has undergone vast changes which have nearly diminished that society's own responsibility. It is apparent that the future years will see still more changes in jurisdictional areas as state governments push to have a larger role in Indian affairs.

This syllabus could not begin to present case studies of tribal development without first explaining to the student the role of the Bureau of Indian Affairs and its formation of federal policy throughout the past two hundred years. Self-determination is a recent federal policy which allows tribal governments greater responsibilities for tribal affairs through assuming increased control. Its larger scope indicates that tribal rights must be upheld, and from here into the future, the responsibility of success lies with the tribal governments.

If this syllabus opens greater horizons to the student through a careful review of tribal laws and development policies, that student is then better prepared for contributing to the future with ideas. It is my hope that future years will allow tribal governments to fully exercise their responsibilities in the areas of jurisdiction and take sovereignty in hand to promote self-determination for all members.

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July, 1975

Course Objectives

1. To understand tribal powers as described in tribal constitutions and by-laws.

2. To understand the complexities of tribal sovereignty.

3. To understand federal and tribal jurisdiction in the area of law and order on Indian reservations.

4. To understand the role of the Bureau of Indian Affairs in its relationship with American Indians.

5. To understand self-determination through case studies.

Organization of the Course

It should be pointed out to the instructor that there are previously developed syllabuses which deal with the formation of tribal governments and the exercise of tribal powers in further detail. American Indian Political Systems would best be utilized by an instructor who intends to specifically study tribal governments. On the other hand, the scope of tribal law, treaties, and government policies are dealt with in the course similarly named Tribal Law, Treaties, and Government. In Tribal Law and Development Policies is an attempt to focus attention upon the tribal law, treaties, and governmental policies affecting the Lakota people.

An instructor wishing to study contemporary issues and case studies wherein development is seen through the exercise of tribal powers, treaty rights, or sovereignty may find such structure in this syllabus of Tribal Law and Development Policies.

This syllabus builds its foundations upon the passage of the Indian Reorganization Act and the preceding treaties which shaped federal policy and saw the creation of tribal governments. An insight into the balance of power concept in tribal affairs is presented in Unit One, but the focus of the unit should be to refresh the students' memory as to the background and structure of tribal constitutions and by-laws. Felix Cohen's Handbook of Federal Indian Law is an authoritative work, but The Indian, by Sophie Aberle and William Brophy, presents an excellent, easily read view of tribal governments. Volume Two of Justice and the American Indian reveals a contemporary view of the American Indian Court Judges Association and should definitely be included for student study.

Tribal sovereignty in Unit Two is probably best illustrated by Felix

Cohen in Chapters 5, 6, and 7 of the Handbook of Federal Indian Law, which detail the scope of federal powers and state powers over Indian affairs and the scope of tribal self-government. Tribal powers grew out of the interpretations of sovereignty for Indians; and through court case after court case, the current status of tribes has evolved. The pressure Congress exerted upon sovereignty is best evidenced by the passage of the termination bill, Concurrent House Resolution 108, and Public Law 280. A student studying this unit should become aware that sovereignty of tribal governments is affected not only by the Congress of the United States but also by federal courts who adjudicate suits or interpret federal statutes. It must be pointed out that state governments, in their rulings upon Indians outside of the reservation, are continually pressing to lessen the conflict between their courts and reservation courts.

The administration of justice is a contemporary issue which has yet to be finally resolved to everyone's satisfaction. A multitude of law enforcement agencies are forced to cooperate in the administration of justice, and the "time lag" is usually slowed even more by factors such as speaking the native language or knowing the local population. Felix Cohen deals brilliantly with the issue of criminal and civil jurisdiction in Chapters 18 and 19 of his handbook. It is in Unit Three that the student may see the complex situation which has occurred through the changes in land ownership and congressional legislation. "Who has jurisdiction?" is a question that prompts one to consider the "implied consent" stance which tribal governments may take over non-Indians living within their borders.

In Unit Four, the student may review the history of the Bureau of Indian Affairs and its subsequent policies. A History of Indian Policy, written by the Bureau of Indian Affairs, is possibly the best available

work describing the evolution of Indian policy. American Indian Policy supports the earliest years of dealing with Indians by the federal government, but stops short at the year 1934 when the formal Bureau of Indian Affairs was organized. Two other contemporary works, Big Brother's Indian Program, With Reservations and Our Brother's Keeper are both excellent, but tend to be too diversified for a learner because of the constant shift of attention focus. Through Unit Four, the student should obtain a strong concept of the development of the Bureau of Indian Affairs, its structure, and the policies which it has enforced throughout the years of its existence.

The last unit of this syllabus deals with the concept of self-determination, which evolved out of presidential concerns that the termination phase was not well received by Indian groups. The background of self-determination is seen best in The Indian by Brophy and Aberle. The policy itself is contained within President Nixon's speech to Congress in 1970, but the documentation of the effect of these policy changes is as yet unwritten, although many tribes have contracted services previously controlled by the government.

The student should focus attention on the retention and exercise of tribal powers through the intent of self-determination, the intent being that tribes develop as the tribal members wish to retain their prestige, heritage, and culture without overt pressures by the federal government. To this end, the case studies which are presented are excellent documents to review self-determination efforts for fishing, community development, and maintaining the land base, the crucial link between the federal government and the Indian.

UNIT ONE
TO UNDERSTAND TRIBAL POWERS AS DESCRIBED IN TRIBAL CONSTITUTIONS AND BY-LAWS

Objectives

1. To understand congressional support for tribal powers as established by the Indian Reorganization Act.

2. To understand the various types of tribal powers, such as membership, territory, distribution, taxation, and administration of justice.

3. To understand that tribal powers can be exercised through various types of governing bodies.

4. To understand the concept of balance of power in tribal governments.

Materials

Brophy, William A. and Aberle, Sophie. The Indian: America's Unfinished Business. Norman: University of Oklahoma Press, 1966.

Chapter 2, Tribal Governments

Cohen, Felix. Handbook of Federal Indian Law. Albuquerque: University of New Mexico Press, 1971.

Chapter 7, The Scope of Tribal Self-Government

Hargrett, Lester. A Bibliography of the Constitutions and Laws of the American Indian. New York: Kraus Company, 1947.

National American Indian Court Judges Association. Justice and the American Indian. Volume 2. Washington, 1973.

Price, Monroe. Law and the American Indian. Indianapolis: Bobbs-Merrill Company, Inc., 1973.

Chapter 1, Sovereignty and the Flow of Power
Chapter 2, Strengthening Tribal Government

"To Provide for the Establishment of the American Indian Policy Review Commission." S. J. Resolution 133, 1st Session, 93rd Congress. Report No. 93-594. Sponsored by Senator James Abourezk.

Title 25--Indians. Code of Federal Regulations. Washington: Government Printing Office, 1939. (Revised Yearly)

Sub-chapter F-11, Tribal Government and Enterprises

Tyler, S. Lyman. A History of Indian Policy. Washington: United States Department of the Interior, Bureau of Indian Affairs, 1973.

Chapter 6, Tribal Reorganization

Washburn, Wilcomb E. The American Indian and the United States. Washington: Smithsonian Institute, 1973.

The Wheeler-Howard Act (The Indian Reorganization Act). 48 Stat. 984, United States Congress, 1934.

To the Instructor:

Tribal powers, as contained within tribal constitutions, were developed through the sponsorship of the Indian Reorganization Act. An introduction to this syllabus should be the review of the passage of the Indian Reorganization Act which allowed American Indians to vote to accept or reject the provisions of the Act. The following is included in the Act.

> SECTION 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters, and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

For those tribes who accepted the Indian Reorganization Act, the implementation of Section 16 meant the actual drawing up of tribal constitutions and by-laws. Although this was largely accomplished under the guidance of the Bureau of Indian Affairs, it attempted to include all the necessary sections for a governing body. Generally, such constitutions established representative governments in which the tribal group elected a governing body. This body operated under the authority given it through the very constitution which the members of the tribe approved.

It should be mentioned here that tribal governments assumed various characteristics. The most common form of government is that of the representative form. However, another form is that which combines both the

representative and traditional forms of government. In this instance, governing officials are elected by members of the tribe, as stated in their constitutions, but are required to operate with those traditional leaders who hold traditional governing positions.

Another form of government unique to the Puebloes of New Mexico in this century is the traditional form controlled by theocracy. It is recognized under the Treaty of Guadalupe Hildalgo (between the United States and Mexico), which prccedes the Indian Reorganization Act. In the pueblos, the religious leaders select both the civil leaders and the officers of the tribe. Although a few puebloes, four out of approximately twenty, have established constitutions and one has given women the right to vote, the religious leaders still control governmental affairs within the tribal group.

In general, constitutions and by-laws established representative governments and set up the rudiments for a functioning body. Articles described territory and established by congressional acts which defined reservation boundaries through treaties, executive orders, or statutory regulations. The membership of the tribe includes all who reside within that territory and who have met the particular qualifications in the article for membership. Officials of the representative government are elected from political districts established in the constitutions. In some tribes, provision is made for officers of the body of representatives to be selected at large from among the people. The powers enumerated for the operation of the tribal government range from taxation to the enactment of resolutions or ordinances, with "subject to the review of the Secretary of the Interior" written into each clause of operation. Other articles may specify judicial powers or give special attention to

communities. Many times, the only specific articles are those that deal with the control over lands within the reservation. These clearly delineate the exercise of tribal powers over land assignments but are limited in powers in terms of reservation land being held in trust status. Other major articles deal with the conducting of tribal elections, referendums, and removal of officers.

As stated previously, the writing of the tribal constitutions was confined to a select group who used the United States Constitution as a model. Even this method resulted in the lack of inclusion of those amendments known as the Bill of Rights. The passage of Public Law 284 in 1968 was necessary to allow for such rights. It is highly possible that the complexity of treaties and agreements accounts for the failure of tribal constitutions to establish some of the necessary priorities for its functioning government. Constitutional clauses continually state "subject to review of the Secretary of the Interior," and as in the Preamble of the Oglala Sicux Tribal Constitution, refer to the relationships with the United States through "power to exercise certain rights of home rule not inconsistent with federal laws and our treaties."

Although Section 16 of the Indian Reorganization Act allows for amendments to be presented to the Secretary of the Interior for inclusion in the constitution, an extremely low number of tribal governments have sought to add amendments. In terms of the complexities surrounding tribal governments, the Indian people either have to allow for amendments to meet these needs or to allow the federal government to lead them once again. In view of this, a joint Senate bill by South Dakota Senator Abourezk endeavors to study tribal governments in order to make recommendations which would facilitate the operation of tribal governments in the future.

Most tribal constitutions do not contain a balance of power nor do they contain staggered terms for tribally elected officials. These points have been the source of much dispute in attempting to have orderly governments operating on Indian reservations.

In fact, while the concept of balance of power is one which is part of western thought in origin, its implementation in tribal governments is hardly visible. Oftentimes, there exists only one legislative body which elects officers from among themselves. An independent functional judicial system is nearly non-existent as most tribal judges are either subordinate to the council or to the chairman, with limited years of service. Even though a tribe may establish some semblance of balance of powers, its own legislative acts through resolutions and ordinances are subject to veto by the Department of the Interior. This veto power of the Department of the Interior, therefore, affects the operation of tribal governments and the concept of balance of power.

The veto power of the Department of the Interior is best illustrated through the Commissioner of Indian Affairs Report of 1900, which outlines the order taken to abolish the Osage Tribal Government of the Osage Tribe.

> A crisis in Osage governmental affairs was reached in the election of tribal officers in 1898. After a bitter factional controversy, and after an investigation had been conducted by Inspector McLaughlin, the Department, on February 21, 1899, decided the contest in favor of Black Dog, representing the full-blood element, as principal chief and Ma shah ke tah, the candidate of the progressive or mixed-blood party, as assistant principal chief. The Osages, however, became involved in another dispute over the election of members of the national council, which was only settled by the Department order of January 18, 1900, recognizing twelve members as having been duly elected and constitutirg a quorum of the council, leaving three vacancies to be filled by that body.
>
> These and other considerations impelled the office, on February 21, 1900, to recommend the issuance of a Department order abolishing the Osage national government, excepting the national council and the offices of principal chief and assistant principal chief. Such

an order was issued March 30. May 19 the office recommended the abolishment of the national council which was ordered by the Department May 21, 1900.

The principal causes that led to the abolition of the Osage tribal government were: (1) acrimonious disputes between the two factions over elections; (2) entire absence of harmony between the Osage tribal officers and the Indian agent in the administration of tribal affairs; (3) the selection of ignorant men as office-holders, and (4) the profligate use of moneys received from permit taxes.

The tribal government was abolished after the conditions had been fully investigated by a special Indian agent and after the facts developed in his investigation had been carefully considered by this office and the Department. It was determined upon as the wisest step to take, in view of the tangle into which the affairs of the Osage Nation had gotten. It has resulted in the reduction of expenses and consequently a considerable saving to the tribe in the amounts heretofore expended for salaries of a long list of tribal officials.

Volume Two of Justice and the American Indian attempts to point out that, although the federal government of the United States is often credited as containing separation of powers, in reality it is less a separation than a brotherhood. It points out that states and municipalities are left free to determine their governmental forms under their state constitutions, as are Indian tribes. It also states that the affairs of a city are more oriented to that of a business rather than a sovereign state, and as such, a system known as the Commissioner Form is extensively used among municipalities.

In view of this, we must look also at Cohen's Handbook of Federal Indian Law, which states that tribal self-government includes the power to adopt and operate under a form of government of their own choosing. This power does not come from any congressional enactment or constitutional provision but from the "inherent powers of a limited sovereignty which has never been extinguished." Further, Indian tribes are not states but have a status higher than that of states. "They are subordinate and dependent

nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."

The separation of authority can be noted in some tribal governments wherein the chairmen of tribal councils are elected at large from among the general membership rather than being selected from within the council members. An example of a new trend is that of the Seminole tribal government in Florida which has separated its tribal functions so as to detach its business affairs from its governmental affairs. This is done by the governmental body which acts under the constitutions. It also can establish charters to conduct the business affairs of the tribe. The subordinate organizations are distinct structures with distinctly recognized powers.

The issue of separation of powers continues and is most apparent in courts on Indian reservations. While the judicial system in American acts as a check for legislative acts and will overturn any adverse acts, the tribal court system generally operates as a subordinate to the legislative body. This is often pointed out as a serious weakness in that tribal officials may intervene in tribal courts through judges who are appointed or paid through the tribal office. Such intervention does not strengthen tribal governments nor the tribal court system. Advocates of the separation of powers in tribal courts see the need for protection of the rights of individuals and the insulating of tribal judges from political pressures to insure their independence.

Cohen's Handbook of Federal Indian Law is an excellent source for the scope of tribal self-government. Chapter 7 details self-government through the derivation of tribal powers, beginning with the 1832 Worchester vs. Georgia case. This case upheld the right of a tribe to exercise its

sovereignty as long as it was consistent with federal law. It also pointed out that Indian nations are distinct, independent, political communities.

That Indian tribes have inherent powers is based upon three principles: an Indian tribe possesses all the powers of any sovereign state; conquest renders the tribe subject to the legislative power of the United States and terminates the external powers of sovereignty of nations, but this does not affect its internal sovereignty, which contains the powers of self-government; and tribal powers are subject to qualification by treaties and by legislation of congress. However, a tribe is allowed to retain full powers for internal self-government by their duly constituted organs of government.

Cohen details the powers of self-government in ten sections which include the power to determine tribal membership; regulate domestic relations, control of descent and distribution, taxing powers, powers over property, powers for the administration of justice, and any other statutory powers of tribes in Indian administration. Each section is illustrated with law cases which have supported the powers of tribal governments and emphasizes the continuous need for tribal governments to exercise their full powers. Restrictions by Congress have shaped the exercise of self-government through specific statutes, but there remains areas which have not been covered by legislation. These areas become the prime responsibility of tribal government. In view of the many years between legislative acts by Congress and the ever-changing demands by a modern world, the function of tribal governments should become even greater to meet the needs of its members.

The instructor should include in this introductory unit a review of one particular tribal constitution and by-laws which would be of interest

to the students. The class may prefer, however, to choose several tribal constitutions in order to compare. It should be pointed out that tribal constitutions may be obtained from representative governments (such as the Oglala Sioux Tribe), combination of representative and traditional governments (Warm Springs Tribes of Oregon), General Council (Crow Tribe of Montana), a non-Indian Reorganization Act tribal constitution (Navajo Tribe), and a theocracy constitutional government (Isleta Pueblo). Such a venture could include comparisons with the United States Constitution for both freedoms and powers and should include the use of major legislation to limit tribal power, such as the Dawes Allotment Act.

Student Activities

1. Discuss the merits of the Indian Reorganization Act through the various provisions contained therein. Would the class accept such legislation if they had an opportunity to vote on it at this time? Point out the various types of governments which could be established under Section 16.

2. Obtain copies of tribal constitutions and by-laws and do a research project through comparing written versions and the type of reservation situation which is shaped by the legislation. In particular, compare the constitutions of allotted reservations as opposed to non-allotted reservations.

3. Use articles of tribal constitutions to prepare a short speech on one of the chosen articles. Stress the pros and cons which could arise over the particular article, such as membership or territory. Try to recapture the intent of the writers and project how relevant the article is in this decade.

4. Discuss the use of checks and balances in tribal governments. Include the role of the Department of the Interior. What ideas could be brought out about improving tribal governments?

5. Obtain a copy of the Joint Resolution 133, sponsored by Senator Abourezk. Discuss the implications of this bill. Obtain copies of the work which the Indian Policy Committee has done under this bill. Discuss the relevance of changing tribal governments.

6. Review local municipalities' constitutions in comparison with state constitutions. Discuss the usefulness of constitutions in general for governments.

UNIT TWO
TO UNDERSTAND THE COMPLEXITIES OF
TRIBAL SOVEREIGNTY

Objectives

1. To understand the status of domestic dependent nations.

2. To understand sovereignty issues involving state governments.

3. To understand sovereignty issues involving federal government.

4. To understand sovereignty issues involving federal and state court decisions.

Materials

Cohen, Felix. Handbook of Federal Indian Law. Albuquerque: University of New Mexico Press, 1972.

Chapter 3, Indian Treaties
Chapter 5, The Scope of Federal Power over Indian Affairs
Chapter 6, The Scope of State Power over Indian Affairs
Chapter 7, The Scope of Tribal Self-Government
Chapter 14, The Legal Status of Indian Tribes

Indian Law Reporter. Washington: American Indian Lawyer Training Program.

National Indian Law Library. The NILL Catalogue. Vol. 1. Boulder: Native American Rights Fund.

Price, Monroe. Law and the American Indian. Indianapolis: Bobbs-Merrill, 1973.

Chapter II, The Powers of the State
Chapter V, Strengthening Tribal Governments

To the Instructor:

The status of sovereignty continues to be debatable, regardless of the passage of the Indian Reorganization Act, and takes its roots in Indian history with the first treaty. Sovereignty, like the concept of balance of powers, has been viewed by some as the transfer of Western thought onto American soil to encompass the relationship between whites and Indians. Its origin is non-Indian, and its application to non-state tribal organizations indicates that its users interpreted tribal groups to be sovereign nations, just as they viewed themselves.

In Chapter 3 of Handbook of Federal Indian Law, Felix Cohen outlines the background of sovereignty for Indian tribes. Treaties were signed as early as 1532 and were continually made for another three hundred and thirty-nine years until Congress stopped the treaty making in 1971. Treaties continued to be signed under the guise of agreements into this century. Cohen points out that holding a land title and making a treaty to transfer such title to another sovereign nation is an act of sovereignty. This land issue is one which has involved the organization of the Indian Court of Claims in recent times to unscramble the taking of Indian lands by the United States through error or without just compensation.

For the most part, treaties were written on the part of the United States requesting particular acts by the signers. Most of the treaties primarily dealt with land boundaries and economic trade to be established between the two nations. Treaties also covered other areas, such as status as to war and peace, passports, extradition, relationship with other powers, dependency as to protection, trade relations, representation in Congress, power of Congress, power of the President, termination of treaty making, commercial relations for cessions of land, reserved rights on

ceded land, payments and services to tribes, criminal and civil jurisdiction, and control over tribal affairs. Treaty clauses were written in a legal, technical language, and were highly organized. Treaties had to be interpreted for the signers who were unable to speak the English language or sign their names, another practice of Western origin.

In 1899, in Jones vs. Meehan, a Supreme Court decision made issue of the lack of command of the English language, either written or oral, by treaty signers who had signed a treaty and claimed disagreement with the clauses. This decisions pointed out that treaty signing took place between a stronger and a weaker nation, a defenseless people who were wards of the stronger nation and dependent upon the good faith and protection of it.

> In considering any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding in the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the Indians, on the other hand, are a weak and dependent people who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Treaties are pointed out by the American Indian Court Judges' Association as generally unilateral documents with clauses containing the proper language to show that any crimes committed either by Indians or citizens of the United States were to be punished according to the laws of the state or of the territory of the United States. No provisions were made for the punishment of offenders by the Indian nation itself.

Two of the most important historical cases about tribal sovereignty took place in the 1830's. Both cases involved the Cherokee Nation, which resided within the state of Georgia. After the formation of the United States of America, settlers organized the state of Georgia and pressured the Cherokees to leave their homelands so that more lands would become free for homesteading. The Cherokee people refused to leave and the state of Georgia declared state jurisdiction over the Cherokees. Gold was then discovered on Indian land and the Cherokees fought to keep out all whites while the state protected the trespassers. The Cherokee Nation turned to the federal courts to enforce tribal law through legal channels. The court decision which ensued was an opinion of the federal court that an Indian tribe or nation was not a foreign state:

> Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. The relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants.

This opinion by Chief Justice Marshall established the scope of tribal sovereignty in its relationship to the United States, but it did not establish such relationship to the state of Georgia. In fact, it did not say whether the action by the state of Georgia was either valid or unconstitutional. It established Indian tribes as "domestic, dependent nations" and their relationship to the United States as one that resembled "a ward

to a guardian."

Looking for better legal grounds, the Cherokee Nation later arrested a missionary illegally on tribal lands and sentenced him to four years in prison. He appealed to the United States and the result was Worcester vs. Georgia. This court case recognized the relationship of the tribe to the state.

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this Nation is, by our constitution and laws, vested in the government of the United States. The act of the State of Georgia, under which the plaintiff in error was prosecuted, is, consequently, void and the judgement a nullity.

In subsequent cases, the Supreme Court continued to affirm the status of either Indian treaties or the domestic laws of the tribes. In Holden vs. Joy, 1872, the sovereign nature of the tribe was reemphasized.

> Throughout, the Indians as tribes or nations, have been considered as distinct, independent communities retaining their original, natural rights as the undisputed possessors of the soil, from time immemorial, subject to the conditions imposed by the discoverers of the continent which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed.

This is much the same as Cohen states in his view of tribal governments, that such governments contain "inherent powers of a limited sovereignty which have never been extinguished," and "they are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."

Jurisdiction is an indication of sovereignty since it involved the authority to administer justice. While the Worchester vs. Georgia case established the jurisdiction of the tribe, it was followed by the Intercourse

Act, which gave criminal jurisdiction for non-Indians to the United States in Indian territory and left the tribes only criminal jurisdiction over Indians on Indian Land.

By 1881, the Supreme Court had declared that tribal government did not even have jurisdiction over white offenders or white victims in Indian country, and the states were to assume such jurisdiction. The decision in United States vs. McBratney was applied to Indians by the District Court in South Dakota in Ex Parte Crow Dog. The District Court was denied jurisdiction over an Indian offender committing a crime against another Indian in Indian country.

Congressional pressure brought about the passage of the Major Crimes Act as a result of the Ex Parte Crow Dog case, in which Crow Dog was freed. This act was to insure that the crime of murder would not go unpunished, even between Indians on Indian reservations. Additional crimes have been added to the act, increasing the number to thirteen major crimes. The force of the Major Crime Act was upheld by the Supreme Court in United States vs. Kagama.

> These Indian tribes are the wards of the nation. They are communities dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies...The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes.

Sovereignty was continually shaped by the policies of the federal government, either in the courtroom or in the halls of Congress. By the late 1800's, the Dawes Act was intended to distribute commonly held Indian

land among the individual members of the tribes. It took control of the distribution of land from Indian tribes, another aspect of sovereignty. The Dawes Act remains unchanged today. It allows the federal government control over Indian lands in a relationship known as a trusteeship.

The case of Choctaw Nation vs. United States, 1886, contained the following:

> The Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States...The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care ard the control of the former...The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudance, formulating the rights and obligations of private persons, equally subject to the same laws.

The Supreme Court continued to decide in cases of sovereignty and the relationship of the tribes to the United States Government was defined.

The sovereignty of Indian tribes continued to be an issue as the Supreme Court acted as both defender and offender until a survey by the Institute for Government Research described the condition of the American Indian in 1928. As a response to this survey, Congress passed the Indian Reorganization Act, which attempted to rectify past wrongs, among them sovereignty. The act vested tribal organizations with real, though limited, authority. In keeping with the spirit of the times, the Supreme Court, in Chippewa Indians vs. United States, 1937, decided that there were constitutional limitations upon the government's dealings with Indian tribes and the lands of one tribe could not be given to another.

Cases involving the upholding of the sovereignty of tribal governments have continued. Recently, in Iron Crow vs. Oglala Sioux Tribe of the Pine Ridge Reservation, the decision recognized tribal sovereignty; and

although termination was passed as a policy of the federal government in 1953 (it was reversed by President Nixon in 1970), it continues to linger through the language of Public Law 280, which gives states the right to assume jurisdiction over Indian reservations. Under the Indian Civil Rights Act of 1968, such assumption of jurisdiction requires the consent of the tribe as a condition to taking that authority away from tribal governments.

In view of the positions of the Supreme Court, the Congress, and the local tribal governments, sovereignty is still a debatable issue. As Public Law 280 implies, the greatest threat to tribal governments is the states' assumption of law and order jurisdiction. Students should review current events to study attitudes for and against such action and to evaluate what rights tribal governments retain in view of the past history of limitations upon their powers.

Monroe Price's Law and the American Indian is a contemporary book which builds upon the work of Cohen. It is excellent in bringing out recent decisions regarding sovereignty and jurisdiction. Chapter II, The Powers of the States, encompasses both Public Law 280 and Indian rights in this decade. Chapter V, Strengthening Tribal Governments, gives case after case concerning the exercising of tribal powers. Many of these powers were established by taking the federal government or state governments into court for legal decision making processes which determined that tribal governments had such powers. It also discusses the Zuni Plan, which is a plan by the Zuni Pueblo to completely "take over" all governmental positions as an exercise of sovereignty.

In concluding this unit, students should understand that the federal court system operates upon federal statutes to offer equal protection, opportunity, and adjudication to American Indians. However, the federal

government system, which deals with Indians, operates upon a background of treaties, special legislation, and policy to which the Indian must often turn back to the federal court for interpretations and compensations. State governments and state courts deal with Indians, just as with any other minority, without any special relationship. It is, therefore, the place of tribal governments to take the initiative in dealing with its tribal powers and the exercise of sovereignty in view of the historical past containing the wide range of courts, legislation, and treaties.

Student Activities

1. Students may discuss active powers vs. non-active powers of tribal governments.

2. Students may research particular treaties, legislation, and policies which have surrounded one particular tribal government and disucss what the term "limiation" has placed upon its legal capacity to operate.

3. Students may wish to set up a model tribal government on paper and exercise tribal powers which they view as necessary in a state of sovereignty.

4. Invite a legal aid attorney to discuss the overlap of jurisdiction upon the issue of sovereignty. What is currently happening within the state in terms of these two issues?

5. Review the findings of the Lincoln Trials in terms of the sovereignty issue of the right of federal marshalls to enter federal Indian reservations with or without the permission of the tribal government.

6. Discuss the tribal governments' function and role on Indian reservations. Are tribal governments a necessity? Will they continue to be a necessity?

7. What would have resulted if tribal governments had not been created

by legislation under the Indian Reorganization Act? What would be the position of the Indians? What would sovereignty mean?

UNIT THREE
TO UNDERSTAND FEDERAL AND TRIBAL JURISDICTION IN
THE AREA OF LAW AND ORDER ON INDIAN RESERVATIONS

Objectives

1. To understand how the federal government administers jurisdiction.

2. To understand that tribal governments retain tribal jurisdiction.

3. To understand the importance of land status in determining jurisdiction.

4. To understand the role of the various law enforcement agencies.

5. To understand the term "implied consent" within tribal powers.

6. To understand the implications of civil and criminal jurisdiction.

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Part A. Sources and Scope of Powers: Nineteenth Century Views
Part B. The Uses of Sovereignty
Part C. Asserting Sovereignty: Tribal Power
1. Extradition
2. Tribal Courts
5. Tribal Jurisdiction Over Non-Indians
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Chapter One, Indians are Citizens
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Chapter Three, Increased State Involvement in the 1950's
Chapter Six, Relations Between Indian Citizens and States Today

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To the Instructor:

The study of jurisdictional issues should follow the unit on sovereignty as it is within the framework of sovereignty that jurisdiction is anchored.

Treaties contained clauses as to the punishment of evil doers and the delivering of criminals to the agent or appropriate official with some indication of who was to administer the punishment. Many of the treaties written with the Sioux (Lakota, Nakota, and Dakota) people stipulated that

> If bad men among the whites, or among other people subject to the the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indians, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong doer to the United States to be tried and punished according to its laws; and in case they willfully refuse to do so, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States.

This clause was interpreted by supporters of the Major Crimes Act as giving authority to the federal government to assume federal jurisdiction over crimes committed on Indian reservations. The Major Crimes Act was legislation which grew out of the killing of Spotted Tail, a famous Rosebud chief. It disregarded that the murder had been settled through payment under traditional Lakota tribal law. Crow Dog, the murderer, had received punishment.

The Major Crimes Act names thirteen crimes over which the federal government has the authority to prosecute offenders on reservations. Crimes

of a lesser nature are left to the tribal courts and their jurisdiction.

The major crimes include: murder, manslaughter, rape, carnal knowledge as defined in the statute, assault with intent to rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny. It should also be pointed out that these crimes are to be handled by the federal government when there is not jurisdiction by the state. If there is state jurisdiction upon a particular reservation, the state is the proper authority to prosecute crimes. States assume jurisdiction either through Public Law 280 or the Indian Civil Rights Act of 1968.

On a reservation without state jurisdiction, the federal government prosecutes for major crimes (this includes both Indians and non-Indians). If a reservation has state jurisdiction, the state enforces its state punishments upon both Indians and non-Indians. This leaves the tribal government and tribal courts jurisdiction over only those offenses which violate tribal law and are committed within the reservation boundaries. Such jurisdiction is generally just over the members of the Indian tribe and leaves out any non-Indians who may also reside within the reservation. It should be added that the Indian Civil Rights Act of 1968 placed a ceiling on tribal imprisonment to a maximum term of six months, and a $500 maximum fine. This reduces the capacity of the tribal court to act on crimes and further limits activity to misdemeanors.

The simplest part of understanding jurisdiction is that no courts outside of the reservation can enforce tribal offenses. Tribal offenses are limited to tribal courts operating on Indian reservations. It is doubtful that students will find tribal laws which are either "quaint" or "traditional in nature," as most of the laws are based upon Tribal Codes

written under the direction of the Bureau of Indian Affairs.

After the general rules of jurisdiction have been understood, it is important to determine the race of the victim and offender and the place the crime happened (on or off reservation). Indians who commit crimes against other Indians off reservation are subject to either state or federal prosecution, depending upon the nature of the crime. Crimes of a tribal misdemeanor nature concerning Indians against Indians within the reservation are subject to tribal prosecution. Within the reservation, any crime between Indians named in the Major Crimes Act is under federal prosecution in federal courts. While this situation is descriptive of crimes between Indians, it also applies to crimes between an Indian and a non-Indian.

The hidden difficulty of prosecution of crimes on Indian reservations is evident mainly with the crimes committed between non-Indians. A non-Indian committing a tribal misdemeanor on the reservation goes free if the tribal government has no jurisdiciton over non-Indian offenders. Such a situation leads to further complications when a state felony is committed. If the state does not have valid jurisdiction on the reservation, then who assumes the jurisdiction? Only when the felony is of a federal nature does the federal court assume such jurisdiction.

The jurisdiction issue is not limited solely to the types of prosecution. The student must also take into account that there are at least nine categories of land ownership on allotted Indian reservations and a smaller amount on unallotted reservations. On allotted reservations, the ownership may be in heirship through allotted land which was distributed under the provisions of the Dawes Act in 1887. Allotted lands are held in trust by the Bureau of Indian Affairs and, therefore, fall under

federal and tribal jurisdiction. Patent fee land once severed a tribal member from active membership but that practice has since been terminated. If such land still remains in Indian ownership, it is under trust status; but if it has passed into non-Indian hands, it becomes deeded land and is not under trust status. Ceded land is owned by the state or non-Indians after having been bought from an Indian owner; this land is deeded. Government lands belong to the federal government. The government also maintains lands which are not of the following status: trust, government land, tribal land, heirship, allotted, patent fee, deeded, or ceded. This land is called surplus land and is the government's responsibility. Submarginal land is also owned by the government and held in trust. Tribal land is that land which the tribal government has bought from individual tribal members; it is also held in trust status.

The location of a crime becomes of major importance when the land upon which the crime was committed is either deeded or is trust land. Non-Indians residing upon deeded lands do not fall into the jurisdiction of the state, just as an Indian committing a crime upon such land does not come under state jurisdiction. The cases of Beardslee vs. United States (387 F 2nd 280, 8th Cir, 1967) and Seymour vs. Superintendent (368 U.S. 351, 1962) both gave the federal government jurisdiction over people residing with the boundaries of an Indian reservation. Non-Indians and Indians committing felonies of a federal nature on trust lands are subject to federal prosecution. This intent is clearly described in the United States Criminal Code, of which Chapter 53 of Title 18 in Section 1151 describes what is legal in Indian country.

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country" as used in this chapter means a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding

> the issuance of any patent, and, including rights-of-way running through the reservation, b) all dependent Indian communities within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Within the state of South Dakota, the amount of allotted lands which has passed into non-Indian ownership has severly reduced the size of Indian reservations such that many towns have sprung up within the original boundaries of the reservations. Crimes committed within these towns and adjacent areas under white ownership were adjudicated through the state courts until suits were filed by Indians protesting state jurisdiction (State of South Dakota vs. Molash, 199 NW 2nd 591, 1972 and State of South Dakota vs. Williamson 211 NW 2nd 182, 1973). Recently, there was additional controversy when Judge Bogue ruled upon the state prosecution of an Indian within Bennett County of the Pine Ridge Indian Reservation (Cook vs. State of South Dakota, 1974, and Rosebud Sioux Tribe vs. Kneip, 1974). Bogue ruled that Bennett County and other counties of the Rosebud Reservation were no longer a part of the reservation, through the Act of 1910 and other acts by Congress, thus opening such land to non-Indian residents. This ruling is in support of state prosecution for crimes within Bennett County and sets a precedence for the many small towns in Tripp, Mellette, and Gregory counties built upon allotted lands. As the issue stands now in South Dakota, prisoners at the state penitentary who had been prosecuted under state laws were removed from the state penitentary and taken to federal penitentaries. However, with the shift in interpretation, these same prisoners may be returned to state penitentaries.

There is at present a dispute that the final word has been written or adjudicated through the courts as the tribes pressure for Supreme

Court decisions. Additional pressures are being made upon the issue of jurisdiction through the formation of a Civil Liberties Organization, which is primarily supported by non-Indians living within the boundaries of Indian reservations. The state of South Dakota's legislative body passed a resolution in their 1975 session calling for the Congress of the United States to resolve the jurisdictional questions so that law enforcement would be expedited.

As a focus of this unit, the student should be aware of the role of law enforcement agencies dealing with civil and criminal jurisdiction on Indian reservations. It is possible to involve at least six different law enforcement agencies in the solving of a crime, although most tribal offenses involve just one agency. The various enforcement agencies are: the Federal Bureau of Investigation, the Bureau of Indian Affairs, tribal police, state police or highway patrol officers, county sheriff's office, and municipal police.

The Federal Bureau of Investigation has agents at various locations across the country who are available to investigate major crimes committed on Indian reservations. Although these agents receive training in federal Indian law, they are generally non-Indian and unfamiliar with reservation residents, groupings, language, and are at a disadvantage in perceiving customs or traditions.

Bureau of Indian Affairs policemen on the other hand are generally Indian and, when stationed upon their home reservations, are able to speak the language and communicate with the people. These policemen are under the direct command of the Superintendent of the reservation. At times, tribal governments will contract the operation of the police force as a function of tribal government from the Bureau of Indian Affairs. There

are instances when the tribe itself hires its own police force and directs its activities as tribal police. State police are generally highway patrol officers on state payrolls, while country sheriffs and their deputies are on county payrolls. While cooperation exists between all agencies, the only reservation-based law enforcement is the Bureau of Indian Affairs and the tribal police.

In a totem-pole view of the law enforcement authority, the tribal police would operate with the least authority over tribal offenses, but with the largest responsibility. Furthermore, although these policemen would have the deepest insight into cultural implications and command of the reservations' languages, they would be the least trained of the law enforcement agencies.

The student, in concluding this unit, should focus upon the civil and criminal jurisdictional issue in view of the role played by law enforcement agencies and with an understanding of what effect land has upon the type of jurisdiction to be enforced. Perhaps too much emphasis is made of solutions channeled through either state or federal agencies while there exists other avenues to be implemented through tribal governmental powers. In view of this, "implied consent" should be discussed as an action of the tribal council which provides that any person entering Indian reservations consents, through the act of such entry, to the jurisdiction of tribal police and courts. Some triba' governments have recently passed ordinances with just such an intent to control law enforcement for all persons on their reservations.

Students should fully discuss all aspects of jurisdiction in order to see how attitudes are formed which could hinder the smooth operation

of law enforcement agencies. Without doubt, the future of jurisdiction is largely undetermined and, in educational terms, its implementation involves the fact that residents living on or near Indian reservations should be totally aware of individual rights in order to make future co-operative arrangements.

Student Activities

1. Students may view the administration of tribal jurisdiction through an on-site visit to an Indian court and attendance at hearings.

2. Have an Indian policeman employed as a tribal policeman through tribal monies be a speaker on law and order problems on his particular reservation.

3. Request a Bureau of Indian Affairs policeman speak on the law and order situation, giving the history and background for administering federal jurisdiction on his particular reservation.

4. Ask a non-Indian rancher who lives within the boundaries of the reservation to speak expressing his views about jurisdiction and remedies.

5. Conduct a survey within the school as to whether or not non-Indians would be for or against the "implied consent" clause.

6. Obtain maps of allotted reservations and review the status of land ownership with discussion as to the jurisdiction which is applicable to each type of land.

UNIT FOUR
TO UNDERSTAND THE ROLE OF THE BUREAU OF INDIAN AFFAIRS
IN ITS RELATIONSHIP WITH AMERICAN INDIANS

Objectives

1. To understand the formation of the current Bureau of Indian Affairs.

2. To understand various policies enforced by the federal government through the Bureau of Indian Affairs.

3. To understand the organizational structure of the Bureau of Indian Affairs.

4. To understand the relationship between the United States and Indian people.

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To the Instructor:

This unit should bring to the student an understanding of the relationship formed between the federal government and the American Indian through various federally created agencies. It is a relationship which begins prior to the signing of treaties and is currently affected through the passage of federal legislation at the congressional level. Its chief characteristics have affected the sovereignty of Indian tribes and has increasingly become the focus of unrest on Indian reservations.

The role of the federal government began with the British colonies, who created two superintendents of Indian affairs to officiate as ambassadors. Their duties consisted of observing events, negotiating treaties, and keeping peace between Indians and settlers. The superintendents were replaced by commissioners in 1775 when the Continental Congress declared jurisdiction over Indian tribes through three departments of Indian affairs. Each department had a varied number of commissioners. The Middle Department of Indian Affairs has as Commissioners Benjamin Franklin, Patrick Henry, and James Wilson.

In 1777, the Articles of Confederation stated that the power to relate to Indians under Article IX gave the United States in Congress assembled an exclusive right and power to regulate the trade and manage Indian affairs, provided that the legislative right of any state within its own limits was not infringed upon or violated. This established the original federal policy and allowed for further developments by federal agencies over Indian affairs.

Later, the Congress of the Confederation limited the departments of Indian affairs to a northern and a southern department, and placed both

under the control of the Secretary of War. Statutes passed during this period demonstrated the federal government's authority to deal with Indian matters through power to make war, power to govern territories, power to make treaties, and power to spend money.

Although the new Congress sought to relate with the Indian people through its jurisdiction, it was unable to enforce its treaties. Extreme pressure was place upon Congress by advancing settlers and speculators who wanted new lands. Finally, Congress responded with the Northwest Ordinance of 1787, which states

> The utmost good faith shall always be observed towards the Indians, their lands, and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Early laws passed through Congress attempted to maintain peace with the Indians through stricter regulation of the trade and interaction with Indians. On July 2, 1790, a law provided for the licensing of traders and established penalties for trading without a license. It also prevented land sales between individuals and Indians. This was followed by other laws which punished crimes committed against Indians, removed settlers on Indian lands, furnished goods and services to tribes, and required passports for persons traveling into Indian country. During this period, Government Trading Houses were established by the President with direct appointees under the President. The new agency was to furnish the Indians with necessary goods at a fair price and to buy furs in return. It attempted to protect the Indians against the practices of private traders. Each Government Trading House had an agent appointed by the President. The agents were

coordinated by the Superintendent of Indian Trade. Although this office was abolished in 1822, the Secretary of War renamed the system the Bureau of Indian Affairs, by order of Congress on March 11, 1824. The Government Trading Houses were retained with their respective responsibilities. The new Bureau of Indian Affairs included a civilization fund, examination of claims, and routine office duties.

By the Act of July 9, 1832, Congress authorized the President to appoint an official as Commissioner of Indian Affairs who would be under the Secretary of War but subject to all regulations set by the President. Two years later, this was clarified by the Act of June 30, 1834, which provided for another reorganization of the Department of Indian Affairs. It established particular agencies, employed interpreters, purchased supplies, distributed annuities, and continued the work of its former employees. When the Home Department of the Interior was established by the Act of March 3, 1849, the Bureau of Indian Affairs passed from military control to that of civil control. Under this arrangement, the Secretary of the Interior exercised supervisory and appellate powers with the Commissioner, as the Secretary of War previously did.

During this period, the Bureau of Indian Affairs continued to operate with a shortage of superintendents (only nine of the twelve positions were filled). This allowed the continuation of the practice of allowing governors of newly created states to assume the responsibility of a superintendent with the reservation based agents answering to the governors. This arrangement created new tension when the governor encountered a standoff between Indians under his agents and non-Indian citizens of the state. Political battles added to the confusion because superintendents were political appointees of the President, as were the agents. As an answer to this

confusion, the missionaries among the Indians formed various organizations to protect the interests of the Indians and successfully lobbied to be responsible for the civilization of the Indian people. As a result, such a body of people came about to select and recommend agents for each reservation. Furthermore, the Indians were divided among the various congregations wishing to do missionary work. Each reservation was assigned to a recognized church.

In the years following 1849, the War Department and the Interior Department continued to share responsibilities for Indians. Conflicts arose over whether the control should be military or civil because of the continuous wars with Indian tribes. Eventually, civil control conquered, and the relationship between the United States and Indians has remaind essentially one of a dependent, domestic nation. As such, the Bureau of Indian Affairs serves as a corps to perform diplomatic services.

The federal government ceased its treaty making with tribes in 1871. It continued, however, to make agreements. This policy was followed by the Allotment Act of 1887, which broke the reservation lands into small parcels of land per individual. This land would be held under trust by the federal government, and patents in fee were to be issued at the end of the trust period. Civilization efforts were in full force with missionary approved agents, the creation of Indian policemen, custom law courts, boarding schools, and an emphasis upon farming to earn a living. Federal policy was not making much impact, however.

Each year, the Commissioner of the Bureau of Indian Affairs made a report to the Secretary of the Interior who then passed the reports to the President. In 1890, Commissioner Morgan wrote of the general state

of Indian affairs.

> The entire system of dealing with them (the Indians) is vicious, involving, as it does, the installing of agents, with semi-despotic power over ignorant, superstitous, and helpless subjects; the keeping of thousands of them on reservations practically as prisoners, isolated from civilized life and dominated by fear and force; the issue of rations and annuities, which inevitably tends to breed pauperism; the disbursement of millions of dollars worth of supplies by contract, which invites fraud; the maintenance of a system of licensed trade, which stimulates cupidity and extortion, etc.

Increasingly, the Indian Service gained bigger footholds into daily life on reservations until a point was reached when the Indian Service had such control of an Indian's life that every aspect of living was subject to the uncontrolled discretion of Indian Service officials. This situation of complete control eventually became a policy of no control based upon competency. In 1917, disparent at the lack of success in dealing with Indians, it was thought that separating the bad Indians from the good Indians on the basis of competency would allow for better and greater concentration of civilizing efforts. To achieve this,

> Every Indian, as soon as he has been determined to be competent to transact his own business as the average white man, shall be given full control of his property and have all his lands and moneys turned over to him, after which he will no longer be a ward of the Government.

This practice ceased in 1926 after failing to improve reservation living.

Congress attempted to clean up the Indian problem through the granting of citizenship in 1924. This allowed Indians the same rights as other American citizens. Soon, the entire state of Indian affairs received nation-wide attention through the report by the Institute for Government Research called the Meriam Report. Reform organizations called for more changes, and, under pressure, the new Commissioner announced plans for emphasis in areas of Indian lands, Indian education, Indians in Indian

Services, and reorganization of the Indian Service.

The period of autocratic rule by the Bureau of Indian Affairs was thought to have ended with the passage of the Indian Reorganization Act as individual reservations set up tribal governments to govern the people. The present policy continues to be federal guardianship and trusteeship over Indian property while seeking to establish individual and group liberties within the guardianship.

The structure of administration of the Bureau of Indian Affairs is still centralized within the office of the Commissioner of Indian Affairs in Washington, D. C., and the Secretary of the Interior still holds overall responsibility for Indian affairs. Regionalized Area Offices feed into the system with lesser agencies located on the Indian reservations. The Commissioner's staff remains in Washington with only occasional field visits to particular reservations. The Area Office Director's staff acts as a regional authority over each of the reservations with power to determine policy. At the reservation level, Bureau of Indian Affairs agency staff operate local services to the reservation people and carry out policies made in Washington. Periodically, new policies are implemented.

Although the current emphasis is upon Indian self-determination, there remains a grey area in which discretion of Indian Service officials is employed in view of the guardian relationship.

Perhaps the best synopsis of the administration of Indian affairs is contained in the Handbook of Federal Indian Law by Felix Cohen. An organizational chart dated 1940 reflects the basic structure of the Bureau of Indian Affairs, although the changes since that period have included the regionalization of Area Offices and additional assistants to the Commissioner's staff. The major responsibility, which was to cooperate with other agencies,

has changed slightly, especially with tribal governments asserting their powers to deal directly with other agencies of the federal government (since World War II). In view of this, the authority of the Indian Office has become complex but can be divided into these three areas: other agencies of the federal government, local state and county governments, and tribal governments.

The development of Indian policy is best presented in A History of Indian Policy by Tyler. This book details the development of the Bureau of Indian Affairs prior to the Constitution through today's policies. There is a listing of significant dates pertinent to Indian policy which may be useful in organizing teaching materials.

The student should become aware of the policies and practices of the Bureau of Indian Affairs in view of its changing role over the years. Both Cohen and Tyler do an excellent job of identifying and lending objectivity to policies which allowed both individual Indians and tribal groups to demonstrate their abilities to assert control over their own lives. Although termination is still a ghost-like figure, the emphasis upon self-determination has moved the Bureau of Indian Affairs into a fast-moving role. This role demands flexibility and new policies to keep up with the rate of growth in social, economic, and political arenas on Indian reservations.

Student Activities

1. Officials of the Bureau of Indian Affairs may be invited to give a presentation of current policies and to point out progress and efforts being made to keep up with contemporary problems.

2. Update, through research, the current organizational structure of the Bureau of Indian Affairs with designated responsibilities attached to each level.

3. Discuss the terms wardship and guardianship as used with today's policies. Make a general policy regarding such terms or continued use of them.

4. Review the staffing structure of the local Bureau of Indian Affairs agency. Discuss what could be done to improve lines of communication with reservation people. Discuss what offices are actively involved in relating to people and what offices are paper-oriented.

5. Discuss what impact the Indian Reorganization Act has made upon the existence of the Bureau of Indian Affairs.

6. Give some examples of policy changes which have been beneficial to Indian people in this decade.

UNIT FIVE
TO UNDERSTAND SELF-DETERMINATION
THROUGH CASE STUDIES

Objectives

1. To understand the background of self-determination.

2. To understand the struggle for fishing rights.

3. To understand the struggle for community development.

4. To understand the struggle for retention of a land base.

Materials

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Chapter 1, Bureau of Indian Affairs
Subchapters K - O, Lands: Surface Estates and Resources
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To the Instructor:

At this point in the course, the student should be completely familiar with federal policy through the Allotment Act, the Indian Reorganization Act, and the Indian Claims Commission Act, along with lesser landmarks in federal policy. With this background, it is the intent of this unit to allow the student to study particular cases wherein Indian people have attempted to exercise their tribal powers. In order to begin the materials in this unit, a background of termination, which was a federal policy of the 1950's (as House Concurrent Resolution 108 and Public Law 280), needs to be covered. The outrage at this policy brought about President Nixon's self-determination for Indians policy as well as the Indian Civil Rights Act of 1968.

Termination grew out of the federal government's attempt to reduce yearly expenditures for Indian tribes. It sought to increase the responsibility of the states for tribes located within their borders. It was based along the idea of the Johnson-O'Malley Act of 1934, which intended to allow transfer of federal services to the states upon contract arrangements. The intent of termination was unclear as to what functions of the Bureau of Indian Affairs to be terminated or who would assume responsibility for providing these same services. It clearly meant to the Indians that laws passed by Congress intended not only to severe the relationship between the federal government and the tribes but also to place their affairs and resources at the mercy of the state governments, thus rendering tribal governments ineffective.

The issue of jurisdiction was further complicated by Public Law 280, which not only granted judicial jurisdiction, but conveyed legislative

authority to the states. Through its application, state laws could be dropped upon Indian reservations to change the entire character of Indian living. Public Law 280 allowed for state, criminal, and civil legislation to supercede tribal and federal enactments for Indians in Wisconsin, Minnesota, Nebraska, California, Oregon, and Alaska. However, it had certain limitations within its broad interpretations. It aroused opposition to the point that President Eisenhower urged the act be amended to require consultation with the tribal groups. Wendell Chino, President of the National Congress of American Indians, a national organization to lobby for Indian rights, spoke for all Indians when he stated his position.

> Public Law 280 gives to the various states the right to assume civil and criminal jurisdiction on Indian reservations without Indian consent, and as far as the American Indians are concerned, it is a despicable law. Public Law 280, if it is not amended, will destroy Indian self-government and result in further loss of Indian lands. On those reservation where states have assumed jurisdiction under the provisions of Public Law 280, lawlessness and crimes have substantially increased and have become known as no man's land because the state and federal officials will not assume the responsibility of Public Law 280, We urge that the Public Law 280 be amended to allow for Indian consent. The National Congress of American Indians declared in 1969 that "the current alleged policy of the federal government enunciated in House Concurrent Resolution 108 is a policy for the eventual termination of Indian tribes and reservations and serves as an obstacle to the development of our tribes and reservations."

Altogether, sixty-one tribes, groups, communities, rancherias, or allotments were terminated. It was soon apparent that the basic assumption of termination, that of assimilation, would not occur through a legislative approach. The action was taken without preparation of the Indians involved and without planning for future conflicts between the state and the Indians. As a result, terminated tribes, such as the Menominee and the Klamath who were prospering tribes and almost self-supporting, fell beneath the total pressure to uphold state laws. Their sudden wealth from per capita gains

on tribal holdings were subject to misuse by anyone who could promote a sale or invoke the trust of a tribal member. The Menominees attempted to reinstate themselves through exposure of fraud at the time of the termination voting. As a result, in 1972, the Congress reviewed and passed a bill authorizing the Menominee people to resume their relationship with the federal government as a federally recognized sovereign Indian tribe.

The policy for self-determination first began with President Johnson, whose message to Congress proposed "a new goal for our Indian programs; a goal that ends the old debate about termination and stresses self-determination." In 1968, the Indian Civil Rights Act was passed which included the right of a tribe to give consent on jurisdictional issues. It also required Indian courts to apply due process and equal protection to the residents of the reservations. It allowed for state governments to give jurisdiction back to the tribes through retrocession.

The self-determination policy, reinforced by President Nixon in his 1970 message to Congress, pointed out that termination was wrong because the federal government could not act unilaterally to discontinue its legal and moral responsibility to the Indian community. He also pointed out that termination was "clearly harmful" in those cases where it had been applied. Therefore, President Nixon's goal was "to strengthen the Indian's sense of autonomy without threatening his sense of community." He proposed a resolution that would correct termination by offering self-determination for federal funds and services.

> I am proposing legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of federally funded and administered programs in the Department of the Interior and the Department of Health, Education, and Welfare whenever the Tribal Council or comparable community governing group voted to do so.

In short, the President was placing the responsibility for the effectiveness of federal monies back onto the Indians who would operate their own federal programs. During his term of office, President Nixon signed an executive order returning land to the Yakima Reservation (land which had previously been made part of a National Forest through a surveying error). Presidential action also corrected a survey on the Warm Springs Reservation, which returned 66,000 acres to Indian ownership. There were other similar erroneous surveys which required presidential bills to return "taken" lands to the Taos Pueblo and the Pala and Pauma Bands of Mission Indians in California.

On August 2, 1972, Senate Bill 3157, the Indian Self-Determination Act of 1972, allowed for tribes to contract with the Secretary of the Interior and the Secretary of Health, Education, and Welfare in order to administer federal programs. The Act was an outgrowth of Senate Concurrent Resolution 26, which replaced the former policy of termination. Through these two bills, Congress declared its national Indian policy to be one of Indian self-determination and development.

The best documented source for tribal expression of self-determination is found in Uncommon Controversy, which presents the struggle to retain tribal fishing rights by three Northwest Coastal tribes in the state of Washington. Through Public Law 280, the state of Washington moved through the State Legislature in 1957 and 1963 to assume jurisdiction over its Indian reservations within the state boundaries. Under these laws, the state enforced laws for compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets.

Uncommon Controversy begins with the period before treaties were signed with the Northwest Coastal tribes. It follows into the period of treaty signing and the impact of federal policy upon these tribes, with emphasis upon Indian fishing rights. It is an excellent portrayal of the encroachment of federal policy onto life on the reservations. Jurisdiction is assumed by the state over all types of land ownership on the reservation, but the treaties stipulate that the Indians have the right to fish and hunt within their reservation boundaries. The conflict between state authorities and local reservation people is for their continued use of their right to fish, regardless of jurisdiction assumption. The language contained in treaties with the Indians prior to the creation of the state of Washington read similar to the below.

> The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

For the Indians, this treaty language and supportive court cases give the Indians a right to provide for their subsistence and a livelihood through fishing at all "usual and accustomed grounds." Through ensuing court cases and enforced policy measures, there exists a need for support of the Indian rights through proper identification of Indian fishermen, permissible gear, appropriate times for fishing, specification of places, and recognition of treaty rights in the tribe.

In 1967, the Bureau of Indian Affairs set the policy of "off-reservation treaty fishing" while retaining full authority by the Secretary of the Interior. The state of Washington, which had been the focus of demonstrations labeled "fish-ins" and court cases, has ultimately left the state

with the following choices: it must deal with Indian fishing rights as separate from fishing by others, it must regulate the taking of fish so that the tribe will be able to take their share of fish as the state allocates fish to others, and the state must establish that its conservation laws take precedence over treaty rights given through signed treaties.

Self-determination exercised through Indian fishing rights demonstrates the sovereignty given through signed treaties. It maintains the livelihood of reservation residents and affects, therefore, their development based upon their skills.

Another example of self-determination is the initiative taken by Indian tribal communities to begin a cooperative effort to rebuild their lives around a new economic livelihood. The New People, by Edith Inglauer, brings out the documentation of such a cooperative effort. It is about Canadian Eskimos who are brought to their nation's attention by the creation of a Department of Northern Affairs and National Resources in 1953. The Department's purpose was to help the Eskimo and other Canadian Indians adjust to the modern world. Cooperatives were developed in small villages to commercially produce timber, fish, and handicrafts. The author visited these cooperatives in 1961 and reported thriving villages whose members innovate so as to utilize their barest resources to meet their goals. George River and Port Purwell were visited by the author. Ms. Inglauer catches the spirit of the community among the Eskimos who have, within a four-year period, built their incomes from an average of $174 yearly to an average of over $1,000 yearly. The membership of the cooperatives total five hundred, but this is representative of a total of 2,500 other family members involved in some phase of the cooperatives. Total annual rate for cooperative products was about one-half million dollars at last

tally. With the additional income, the Eskimo people established their own store, sawmill, freezer, built their own homes and created a school to send their children to learn. It is a book worth bringing to the attention of students as a positive expression of Indian cooperation in spite of personalities and politics.

Another side of the struggle for self-determination is the land holdings which were taken from Indian tribes through surveying errors, force, or other means. One Hundred Million Acres documents the fact that a vast amount of land across the United States should be under Indian ownership. Using the present tribal land base of 39,663,412.09 acres, the individual allotments of 10,697,621.58, and the recent additional acreage of Alaskan native lands of 40,000,000 acres, the authors build their case for further additions of submarginal lands, restored lands, purchased lands, and ceded lands. This is easily accomplished through legal land right which has been overlooked through the years. It would return the bulk of the 135 million acres lost through surplus at the time of the passage of the 1887 Allotment Act. The act stipulated that each Indian be given an allocation of land based upon a formula, and that after each Indian had received his "share" or allocation, the remaining land would be declared surplus and opened to non-Indian settlement or purchase.

One Hundred Million Acres further recommends that a new land policy be set by Congress so that tribes do not suffer from any further losses. It recommends that such Indian land restored or returned to Indian ownership not be under the control of the Bureau of Indian Affairs or the Department of the Interior.

At this point, it is possible for the students to become familiar

with other facets of the land struggle within the area of water and energy. The fishing struggle is covered in Uncommon Controversy for the Nisqually, Puyallup, and Muckleshoot Indian tribes but should also include the Lummi, Pyramid Lake, Quinault, and Red Lake Tribes. Controversy over the use of water for irrigation purposes would involve the tribes on the Gila River and Colorado River Reservations as well as the Yuma, Yakima, Navajo, and Fort Hall tribes' reservations. Cochiti Pueblo in New Mexico recently allowed vast urban development to be established next to the pueblo and to use its water for recreational purposed. Other tribes involved in the controversy over the use of their water for recreation are the Flathead, Colorado River, Pyramid Lake, and White Mountain Apache. Each of the mentioned tribes are allowing their water rights to be used by non-Indians, usually with the tribe getting the lesser share. Court litigation as yet is unresolved in some cases, while in others, the dispute remains within the tribe.

Regarding energy found upon Indian lands, coal recently has been the source of exploitation (in view of the national energy shortage). Coal is currently mined on the Navajo Reservation and is the source of dispute between local community residents, the large Navajo Tribal Council, and mining companies. Plans to mine coal on the Northern Cheyenne, Crow, and Fort Berthold Reservations are set for the near future as mining operations continue to offer coals as an energy source.

Uranium, a necessity for space-age technology, was recently found in large deposits on the Laguna Pueblo lands. It is currently mined at a large plant employing many of the local community people. Other deposits have been found on the Spokane and Colville Indian Reservations.

Other sources of energy are oil and gas, which are currently being

released on both individual allotments and tribal lands on the Osage, Wind River, Navajo, Five Civilized Tribes, Fort Peck, Blackfoot, and Ute Mountain Reservations. Some of these operations began as early as the turn of the century while others are recent discoveries.

Materials to explore the extent of tribal attempts to retain rights may be available by writing to the particular tribes involved or by consulting the Law Library Catalogue of the Native American Rights Fund in Boulder, Colorado. As stated previously, litigation is still ongoing in many cases. Congressional hearings may be obtained through writing to the senators or congressmen within respective states or by inquiries to the Interior and Insular Affairs Committee in Washington, D. C.

This unit would not be complete without including The Tortured Americans by Robert Burnette. This is a book which documents a tribal member's fight to retain and to exercise tribal rights while a leader among his people. It best illustrates the condition of reservation life out of which the process of self-determination is expected to grow. Amid graft, hostile feelings, and incompetency, the tribal leader is forced to battle the vast bureaucracy and its supportive offices in Washington, D. C. as well as the local tribal members whose only intent is that of hindrance. It is a book that pictures the reservation Indian caught between the "dependent nation" status within the law but subject to the guardianship of the Bureau of Indian Affairs. Perhaps its strongest message is that while the Indian is answerable to the government for almost every facet of life, the federal government does not respond to Indians protesting extortion, embezzlement, election riggings, land frauds, and other assorted crimes against both persons and property.

A student finishing this unit will, through various case studies,

have absorbed a great deal of the contemporary issues among Indian tribes. Beyond these case studies lie the large domain of self-determination to which every individual may contribute through knowledge of tribal powers and tribal rights.

Student Activities

1. Research the reservations terminated in the 1950's and assess the effect of termination. How were tribal members coerced into signing permission? What are their present feelings?

2. Obtain information from the Secretary of Health, Education, and Welfare and the Secretary of the Interior as to what tribal groups have actually tried to contract previous governmental services. Are these efforts successful?

3. Discuss self-determination and development in terms of contracting and protesting to retain tribal rights.

4. Discuss and/or research what tribal rights are held within the state for fishing and hunting. What effect do state laws have upon tribal laws in these areas?

5. Discuss cooperatives as means for self-determination. Are there any Indian reservations involved in cooperatives? Obtain information about Indian cooperatives from local Mormon chapters, state agricultural agencies, and the Bureau of Indian Affairs.

6. Discuss the recommendations of One Hundred Million Acres. Are these realistic? To what extent would the Indian people benefit from a new land policy by the federal government?

7. Discuss the recommendations of The Tortured Americans and the Indian Heirship Bill which is included through comparison with the land policy suggested by One Hundred Million Acres.

8. What could be the effect of self-determination upon the Rosebud Indian Reservation? Is the book, One Hundred Million Acres, a realistic appraisal of other reservations? To what extent does federal policy affect reservation life?

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